BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RICHARD J. A. COX	)	
Claimant	)	
	)	
VS.	)	
	)	
ABILITY SYSTEMS, INC.[1]	)	
Respondent	)	Docket No. **1,061,686**
	)	
AND	)	
	)	
TECHNOLOGY INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the October 25, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. John B. Gariglietti, of Pittsburg, Kansas, appeared for claimant. Kendra M. Oakes, of Kansas City, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 24, 2012, preliminary hearing, with the exhibits admitted into evidence, and all pleadings contained in the administrative file.

ISSUES

The ALJ found claimant did not violate the safety provisions of K.S.A. 44-501(a)(1). Accordingly, Judge Hursh found claimant's accidental injury arose out of and in the course of his employment with respondent. The ALJ's preliminary hearing Order awarded claimant temporary total disability (TTD) benefits and medical treatment.

Respondent contends the ALJ exceeded his authority in granting claimant benefits that should have been disallowed pursuant to K.S.A. 44-501(a)(1)(D). Respondent wants Judge Hursh's October 25, 2012 Order reversed.

Claimant argues the ALJ's Order should be affirmed.

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[1] Previously known as Cedar Vale Human Resources.

The sole issue raised on review is whether this claim should be denied, pursuant to K.S.A. 2011 Supp. 44-501(a)(1)(D), because of claimant's alleged reckless violation of his employer's workplace safety rules or regulations by not using the seatbelt in the company van he was driving when the van was involved in a motor vehicle accident.

FINDINGS OF FACT

After reviewing the evidentiary record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

Richard Cox was age 20 when he sustained personal injury by accident on April 6, 2012. He commenced employment with respondent in approximately 2009, when the ownership and name of the company changed. His job as a caretaker involved taking care of the personal needs of disabled people, referred to in the record as "consumers." Claimant testified he was required to provide consumers with a place to live and a safe environment. He drove them to do shopping and likely to other destinations. At the time of claimant's accidental injury, he took care of only one consumer, Mr. R.

Claimant received a personnel and procedures handbook about a month after the company changed ownership. The record supports the conclusion that claimant signed a document on March 3, 2010, acknowledging he had read, understood, and agreed to comply with the rules in the handbook. Claimant testified he skimmed the handbook when he first received it but later read it fully.

The handbook itself apparently made no specific reference to use of seatbelts, but it did generically require respondent's employees to obey traffic laws. Several pages from the handbook were offered into evidence as respondent's exhibit D at the preliminary hearing, however, the ALJ sustained claimant's objection to the exhibit. Before the accident, claimant was instructed by respondent verbally he was not allowed to transport consumer in his own vehicle.

Claimant was also told to wear a seatbelt at all times when in a company vehicle and to make sure the consumer wore a seatbelt. Claimant thereafter received from respondent a paper documenting the verbal seatbelt instructions.

Claimant testified:

> Q. Okay. Would you say that since you received that instruction, you've made it a habit to wear a seatbelt every time you hop in a company vehicle?
>
> A. Yes.
>
> Q. Are there times when you may have forgotten to wear a seatbelt?

A. Yes.[2]

On April 6, 2012, claimant picked up Mr. R for the purpose of transporting him to meet Mr. R's mother with a view toward having Mr. R participate in a family gathering. The company van was driven by claimant and was involved in a motor vehicle accident before he arrived at his destination. There were two passengers in the van: another caretaker, Jess Helpingstine, who was in the front passenger's seat, and Mr. R., who was in the backseat. Mr. R was described by claimant as being prone to yelling, agitation and physical violence.[3]

Initially, claimant used the seatbelt. However, the GPS device claimant was using directed claimant to the wrong location. Claimant stopped the van, got out, and called respondent to make sure he had the correct address. Claimant testified he left the vehicle to make the call because of the noisy atmosphere and resulting distraction created by Mr. R. Mr. Cox thought he had his seatbelt on before he exited the van to make the call.

Claimant did not remember if he put the seatbelt on when he got back into the van. Claimant did not remember if he was using the seatbelt when the collision occurred. According to the police report, neither claimant nor Mr. Helpingstine were wearing seatbelts when the collision occurred. Mr. R had his seatbelt on when the accident occurred.

The collision took place when claimant was in the process of turning left from a no-turn lane and the van was "t-boned" on the van's passenger side by an oncoming vehicle. Claimant was transported by ambulance to KU Medical Center where it was determined claimant suffered a mild concussion from the accident. Claimant testified that he did not intentionally not wear his seatbelt.

Shannon Moses, respondent's vice president of operations, commenced employment with respondent in January 2012. She was therefore not employed by respondent when claimant began working for the company, nor was she personally aware what personnel and procedures handbook claimant was provided in 2010. Ms. Moses admitted, to her knowledge, claimant did not have any prior safety issues while employed for respondent.

PRINCIPLES OF LAW & ANALYSIS

K.S.A. 2011 Supp. 44-501b provides in relevant part:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees

[2] P.H. Trans. at 18-19.

[3] The second caretaker in the van was present because of Mr. R's behavioral issues.

> within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
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> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
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> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

In *Foos*[4], the Kansas Supreme Court held: "Once the claimant has met his or her burden of proving a right to compensation, the burden of proving an employer's relief from that liability through K.S.A. 44-501(d)(2)[5] is upon the employer."

K.S.A. 2011 Supp. 44-501(a)(1) states in relevant part:

> Compensation for an injury shall be disallowed if such injury to the employee results from:
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> (A) The employee's deliberate intention to cause such injury;
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> (B) the employee's willful failure to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee;
>
> (C) the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer;
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> (D) the employee's reckless violation of their employer's workplace safety rules or regulations;

This section of the New Act represents a significant departure from the corresponding provisions in effect before May 15, 2011. A recent Board case, *Mahathey*,[6]

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[4] *Foos v. Terminix*, 277 Kan. 687, Syl. ¶ 2, 89 P.3d 546 (2004).

[5] The predecessor of K.S.A. 2011 Supp. 44-501(a)(1).

[6] *Mahathey v. American Cable & Telephone, LLC.*, 1,060,756 2012 WL 5461478 (Kan. WCAB Oct. 8, 2012.

contains a discussion of the term "reckless," which was added to the New Act. *Mahathey* contains the following analysis which is useful in this claim:

> "Reckless" is not defined by the Kansas Legislature in the Workers Compensation Act.
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> The definition of reckless in tort claims was discussed at length in *Hoard*.[7] The Kansas Supreme Court quoted Restatement (Second) of Torts § 500 comment a (1963), which states:
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> > "**Types of reckless conduct.** Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so. An objective standard is applied to him, and he is held to the realization of the aggravated risk which a reasonable man in his place would have, although he does not himself have it.
> >
> > "For either type of reckless conduct, the actor must know, or have reason to know, the facts which create the risk. . . .
> >
> > "For either type of conduct, to be reckless it must be unreasonable; but to be reckless, it must be something more than negligent. It must not only be unreasonable, but it must involve a risk of harm to others substantially in excess of that necessary to make the conduct negligent. It must involve an easily perceptible danger of death or substantial physical harm, and the probability that it will so result must be substantially greater than is required for ordinary negligence."[8]
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> Until July 1, 2011, Kansas criminal law defined reckless conduct in K.S.A. 21-3201(c):
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> > Reckless conduct is conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger. The terms "gross negligence," "culpable negligence," "wanton

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[7] *Hoard v. Shawnee Mission Medical Center,* 233 Kan. 267, 662 P.2d 1214 (1983).

[8] *Id.* at 280-281.

> negligence" and "wantonness" are included within the term "recklessness" as used in this code.
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> The 2010 Legislature amended K.S.A. 21-3201 at L. 2010, ch. 136, sec. 13, effective July 1, 2011. K.S.A. 21-3201 is codified in K.S.A. 2011 Supp. 21-5202, which states in part:
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> > (j) A person acts "recklessly" or is "reckless," when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.

The Board finds claimant's failure to wear his seatbelt and his action in turning from a no turn lane violated respondent's safety rules and regulations. However, the Board is hard pressed to conclude claimant's violations constitute "reckless" behavior. Respondent did not sustain its burden of proof to establish the recklessness that K.S.A. 2011 Supp. 44-501(a)(1)(D) requires.

Under the *Mahathey* case, it is clear recklessness contemplates something beyond ordinary negligence. For this defense to apply the preponderance of the credible evidence must support "a conscious disregard of a known risk that exceeds negligence." Recklessness is akin to gross, culpable or wanton negligence.

Claimant's undisputed testimony established claimant was in the habit of complying with respondent's safety policies, including the seatbelt requirement. Claimant candidly admitted that he had at times forgotten to put on the safety belt, but he testified he used the seatbelt regularly. This record supports a finding that claimant's actions were negligent but not "reckless."

Consideration of the circumstances surrounding a safety violation may, under the circumstances of a particular claim, be of assistance in determining whether a claimant was or was not reckless. Claimant was evidently frustrated by his GPS leading him to the wrong address, which necessitated stopping and exiting the van to call respondent. The necessity to stop the vehicle obviously delayed the journey, to some extent at least. Also, the evidence suggests the atmosphere in the van was not quiet and peaceful, given the tendency of Mr. R to yell, scream, act unpredictably, and at times behave in a physically violent manner.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

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[9] K.S.A. 44-534a.

as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Although claimant failed to comply with respondent's safety policies, including his failure to wear his seatbelt, respondent has not sustained its burden to prove that claimant's safety violations were reckless, as required by K.S.A. 2011 Supp. 44-501(a)(1)(D). Thus, respondent's defense based on the cited section of the New Act fails. The Board agrees with the ALJ and affirms his preliminary hearing Order.

WHEREFORE, the undersigned Board Member finds that the October 25, 2012 preliminary hearing Order entered by ALJ Kenneth J. Hursh is hereby affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of March, 2013.

_____
HONORABLE GARY R. TERRILL
BOARD MEMBER

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